APPENDIX A

Supreme Court Memorandum
June 25, 1973

G. I. DISTRIBUTORS, INC., et al., petitioners, v. Patrick MURPHY, etc., et al. No. 72-872.

Facts and opinion, D.C., 336 F.Supp. 1036; 469 F.2d 752.

June 25, 1973. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Petition for writ of certiorari granted, judgment vacated and case remanded to the Court of Appeals for further consideration in light of Miller v. California, —— U.S. ——, 93 S.Ct. 2607, 36 L.Ed.2d —— (1973); Paris Adult Theatre I v. Slaton, —— U.S. ——, 93 S.Ct. 2628, 36 L.Ed.2d —— (1973); Kaplan v. California, —— U.S. ——, 93 S.Ct. 2680, 36 L.Ed.2d —— (1973); U. S. v. 12 200-ft. Reels of Super 8mm Film, —— U.S. ——, 93 S.Ct. 2665, 36 L.Ed.2d —— (1973); U. S. v. Orito, —— U.S. ——, 93 S.Ct. 2674, 36 L.Ed.2d —— (1973); Heller v. N.Y., —— U.S. ——, 93 S.Ct. 2789, 36 L.Ed.2d —— (1973); Roaden v. Ky., —— U.S. ——, 93 S.Ct. 2796, 36 L.Ed.2d —— (1973); and Alexander v. Virginia, —— U.S. ——, 93 S.Ct. 2803, 36 L.Ed.2d —— (1973).

Mr. Justice DOUGLAS would grant certiorari and reverse judgment. See Miller v. California, *ante* (dissenting opinion of Justice Douglas).

Mr. Justice BRENNAN, joined by Mr. Justice STEWART and Mr. Justice MARSHALL, would grant certiorari, vacate judgment, and remand for further proceedings not inconsistent with his dissent in Paris Adult Theatre I v. Slaton, *ante*. See Miller v. California, *ante* (dissenting opinion of Justice Brennan.)

APPENDIX B

Court of Appeals Opinion
December 20, 1973

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. 431—September Term, 1973.

(On remand from the Supreme Court
Decided: December 20, 1973.)

Docket No. 72-1208

G.I. DISTRIBUTORS, INC., ALVIN DRUSS, IRVING HERMAN and DATA AFFILIATES, INC.,

Plaintiffs-Appellees,

—v—

PATRICK MURPHY, Individually and in his capacity as Police Commissioner of New York City,

Defendant,

FRANK S. HOGAN, Individually and in his capacity as District Attorney of New York County,

Defendant-Appellant.

Before:

LUMBARD, FRIENDLY and FEINBERG,

Circuit Judges.

Reconsideration on remand from the Supreme Court, 93 S.Ct. 3056 (1973), of *G.I. Distributors, Inc.* v. *Murphy*, 469 F.2d 752 (2d Cir. 1972), which held that the first amendment rights of plaintiff-appellee, G.I. Distributors,

Inc., were not infringed when the police, while acting pursuant to search warrants authorizing the seizure of six copies of 56 magazines, imposed a temporary restraint on 19,000 additional copies of the magazines which they discovered during their search, until an adversary hearing could be held the following day.

Affirmed.

HERALD PRICE FAHRINGER, Esq., Buffalo, New York (Lipsitz, Green, Fahringer, Roll, Schuller & James, of counsel, on the brief), *Attorneys for Appellees.*

FRANK S. HOGAN, District Attorney, New York County, *appellant pro se,* New York, New York (Michael R. Juviler and Hugh Anthony Levine, Assistant District Attorneys, of counsel, on the brief).

LUMBARD, *Circuit Judge:*

By an order dated June 25, 1973, the Supreme Court vacated the decision of this court in *G.I. Distributors* v. *Murphy,* 469 F.2d 752 (1972), and remanded the case to us for further consideration in light of its decisions in *Miller* v. *California,* 93 S.Ct. 2601 (1973), *Paris Adult Theatre I* v. *Slaton,* 93 S.Ct. 2628 (1973), *Kaplan* v. *California,* 93 S.Ct. 2680 (1973), *United States* v. *Twelve 200-Ft. Reels of Super 8 mm. Film,* 93 S.Ct. 2665 (1973), *United States* v. *Orito,* 93 S.Ct. 2674 (1973), *Heller* v. *New York,* 93 S.Ct. 2789 (1973), *Roaden* v. *Kentucky,* 93 S.Ct. 2796 (1973), and *Alexander* v. *Virginia,* 93 S.Ct. 2803 (1973). Having given careful consideration to these decisions, we conclude that they do not require us to alter our prior opinion.

Court of Appeals Opinion December 20, 1973

In our earlier opinion, we held that *G.I. Distributors'* first amendment rights had not been violated when the police temporarily sequestered overnight 19,000 of the company's magazines until an adversary hearing could be held and a warrant obtained the following morning. We emphasized the unique facts of the case. Armed with search warrants authorizing seizure of six copies of 56 magazines[1] which allegedly were obscene, the police went to the warehouse of G.I. Distributors on January 6, 1972 and discovered the additional 19,000 copies of the publications sometime after 6 P.M. in the course of their search of the warehouse. Aware that these magazines might be destroyed or moved to a hiding place, they segregated the copies and stationed a guard on the premises overnight. As soon as possible the following morning, a full adversary hearing was held before Judge Moldow of the New York City Criminal Court. After examining samples of the magazines, he found probable cause to believe they were obscene and issued a search warrant authorizing the seizure of the 19,000 copies, which were then removed from the warehouse.[2]

In arguing that the minimal prior restraint exercised by the police in this case was unconstitutional, G.I. Distribu-

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1 The police actually found only 55 of the magazines at the warehouse. *G.I. Distributors* v. *Murphy*, 469 F.2d at 753 n.2.

2 As to the 19,000 magazines, we have recently been advised by the parties that they were shipped back to the suppliers of G.I. Distributors after the district court held the police actions unconstitutional and ordered the magazines returned to G.I. Distributors. 336 F.Supp. 1036 (S.D.N.Y. 1972).

G.I. Distributors apparently offered no objection in the district court to the retention by the police or the District Attorney of the 330 magazines initially seized pursuant to search warrants. The 330 copies were to be used as evidence in a still pending New York state criminal prosecution of G.I. Distributors and two of its officers, Alvin Druss and Irving Herman. On May 4, 1973, however, Justice Harold Birns of the New York Supreme Court ordered this evidence suppressed. The government has not appealed from this order, apparently intending to rely on other evidence.

tors relies principally on the Supreme Court's decisions in *Heller* v. *New York* and *Roaden* v. *Kentucky, supra.* We believe, however, that neither of these cases supports G.I. Distributors' contention. In *Heller,* the Court actually affirmed a decision of the New York Court of Appeals[3] which failed to find an infringement of first amendment rights, although an allegedly obscene film had been seized without a prior adversary hearing. Echoing the words of the Court of Appeals, the Supreme Court in *Heller* concluded that there is no absolute constitutional requirement of an adversary hearing prior to a seizure of a movie; a prompt judicial determination following the seizure will often be an adequate guarantee of first amendment rights.

The procedure followed by the police in the present case was in no way at odds with this holding. Within hours after the police came across the 19,000 magazines and set them aside, an adversary hearing was held at which Judge Moldow found probable cause to believe the publications were obscene. Nevertheless, G.I. Distributors argues that much of the language in *Heller,* if not its holding, requires us to reverse our earlier decision. In particular, it is urged that the Supreme Court condemned all pre-hearing seizures, except those in which a limited number of copies of the allegedly obscene materials are seized solely for evidentiary purposes. In our view, there is no basis for such a broad reading of *Heller.* Moreover, the pre-hearing sequestration which occurred here was such a temporary restraint that no real injury was done first amendment rights. At worst, G.I. Distributors was prevented from distributing its publications for a few hours on the morning of January 7, although even this is by no means certain since the record reveals no attempt at distribution by the company.

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3 29 N.Y. 2d 319 (1971).

There is little similarity here with the massive pre-hearing seizures for the purpose of the permanent destruction of books which occurred in *Quantity of Copies of Books* v. *Kansas*, 378 U.S. 205 (1964) and *Marcus* v. *Search Warrants of Property*, 367 U.S. 717 (1961). As we noted in our earlier decision:

> Marcus involved an attempt to suppress allegedly obscene books by means of a vague search warrant which in effect allowed the police to seize anything that they deemed to be obscene. *A Quantity of Books* concerned the seizure of a large number of books under a statute which did not permit a hearing on the books' obscenity until at least 10 days after the seizure and did not require the judge to make a speedy decision after the hearing. Unlike these cases, no extended interruption in the public's access to the magazines nor long term suppression of possibly nonobscene literature was threatened here. 469 F.2d at 756.

But perhaps the most telling reason for not requiring a pre-seizure adversary hearing in cases such as the present one is the danger that, having been forewarned about the evidence the government is seeking, putative defendants may attempt to destroy, conceal, or otherwise dispose of this incriminating material. Indeed, as the *Heller* Court stated, in terms likewise applicable to the magazines at issue here:

> Counsel for New York has argued that movie films tend to "disappear" if adversary hearings are afforded prior to seizure. We take judicial notice that such films may be compact, readily transported for exhibition in other jurisdiction, easily destructible, and particularly susceptible to alteration by cutting and splicing crucial parts of film. 93 S.Ct. 2789, 2795 (1973).

G.I. Distributors also argues that *Roaden* v. *Kentucky*, *supra*, necessitates a reversal of our earlier decision. We disagree. *Roaden* involved a warrantless seizure of a film incident to the arrest of the manager of the drive-in theatre at which the film was being exhibited. Holding that the seizure was unconstitutional, the Supreme Court emphasized that there had been no prior probable cause determination by a judicial officer on the question of the obscenity of the movie. On the basis of this holding, it is urged here that the warrantless seizure of the 19,000 magazines by the New York City police was likewise unconstitutional. But in arguing that the language used in *Roaden* should be applied broadly to the present case, G.I. Distributors overlooks the Supreme Court's admonition in *Roaden* that each case must be determined on the basis of its particular facts. The fourth amendment is not to be read "in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." 93 S.Ct. 2796, 2800 (1973).

The circumstances under which the magazines were seized in the present case differ markedly from those under which the seizure of film took place in *Roaden*. In the latter case the film seized was being shown at a commercial theatre during regularly scheduled performances to the general public. Without difficulty, the sheriff could have first obtained a warrant and then seized the movie. In contrast, the police here stumbled upon additional copies of obscene magazines in a warehouse at night and sought merely to preserve them until an adversary hearing could be held and a search warrant obtained the following morning, by which time the contraband might otherwise have been destroyed, concealed, or transferred out of the jurisdiction. Whatever the police action in this case be called, it was the most limited form of detention consistent with

preventing removal of the magazines prior to getting a warrant the next morning. The police did not destroy the material, transport it, or apparently even interfere with the owners' access to it. They merely prevented the owners from moving the magazines for the period between the search and the adversary hearing the next morning. The courts have often advised police that when they have no warrant for a search or seizure, the proper course is to watch the item under suspicion in order to prevent it from being moved, during which time the search warrant can be obtained. *Cf. Coolidge* v. *New Hampshire*, 403 U.S. 443, 465 (1971); *United States* v. *Marshall*, 14 Cr. L. Rep. 2030, 2032 (9th Cir. Sept. 7, 1973). Essentially, that is what happened here. The police kept watch over the material pending the issuance of a warrant. Perhaps they could have gotten a warrant that night. Instead, they chose to get the warrant after the adversary hearing—certainly a reasonable course to follow, since having a hearing before confiscating all the magazines would actually benefit the owners. The procedure followed here, in short, may be termed a "seizure," but if it is, it is the most limited form of seizure imaginable, and therefore should not be classified as one with warrantless seizures that "become in themselves a form of censorship." *Heller* v. *New York*, 93 S.Ct. 2787, 2793 (1973).

Moreover, the police had ample grounds for assuming that the 19,000 publications were, indeed, contraband. In contrast to *Roaden*, in which "the seizure proceeded solely on a police officer's conclusions that the film was obscene," in the present case all 19,000 magazines sequestered temporarily overnight were copies of publications which two judges had already found probable cause to believe were obscene and for which warrants had been issued.[4] Acting

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4 A search warrant for 24 of the magazines had been issued by Judge Tyler of the New York Criminal Court. A search warrant for the other

entirely on the basis of this judicial determination of obscenity, the police did not go any further than was absolutely necessary under the circumstances in sequestering these copies overnight until a supplemental warrant could be obtained the following day permitting their removal from the warehouse.

Affirmed.

FEINBERG, *Circuit Judge* (dissenting):

I dissent for two reasons from the reversal of Judge Weinfeld's order and from the adherence to our prior opinion.

The first ground is set forth in my original dissent, *G.I. Distributors, Inc.* v. *Murphy*, 469 F.2d 752, 758-60 (2d Cir. 1972). There, I distinguished between seizing *all* copies of an allegedly obscene book or magazine, such as occurred here in the overnight "sequestration," and seizing only a few copies for evidentiary purposes; I expressed the view that in the former situation, a prior adversary hearing must be held. The reasons for that view are fully explained in my prior dissent, which I incorporate here. Since then, the Supreme Court's decisions in *Heller* v. *New York*, 93 S. Ct. 2789, 2794 (1973), and *Roaden* v. *Kentucky*, 93 S. Ct. 2796, 2800 (1973), by citing with approval *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), upon which I mainly relied, further reinforce my conclusion that appellees' conduct in this case infringed the first and fourteenth amendments.

The second ground for my dissent rests on the fourth amendment and derives from the *Roaden* decision, *supra*,

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32 magazines had been issued by Judge McQuillian, another Criminal Court judge. Although approximately a year and a half later Justice Birns of the New York Supreme Court determined that these search warrants were constitutionally invalid, see fn. 2 *supra*, at the time of the seizure the police had no reason to doubt their validity.

93 S. Ct. at 2801, which emphasizes the illegality of seizing "all the books in a bookstore" without "a constitutionally sufficient warrant . . . ." The majority concedes, as it must, that the "quarantine" of the 19,000 magazines prior to the issuance of a warrant after an adversary hearing "may be termed a 'seizure,' . . . ." My brothers, however, attempt to distinguish this case from *Roaden*—in part, because of the "ample grounds for assuming that the . . . publications were, indeed, contraband" since warrants had already issued for a limited number of copies. But probable cause is not the only prerequisite to a valid fourth amendment seizure. Additionally,

> the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. [Footnote omitted.]

Stanford v. *Texas*, 379 U.S. 476, 485 (1965). The original warrants authorizing the taking of six copies of 56 magazines did not call for seizing *all* copies of the offending publications. To the extent that the seizure exceeded the specimens allowed by the warrants, it had *no* warrant authorization at all.[1] In calling for "a constitutionally sufficient warrant," *Roaden* nowhere implied that courts were henceforth to distinguish between greater and lesser degrees of inadequacy based on a sliding scale of "cause." On the contrary, the Supreme Court held that warrantless seizures—such as occurred in the present case—were simply unconstitutional.

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1 Indeed, the anomaly is that at the very time that the majority breathes life into the massive seizures here, by again overruling Judge Weinfeld's order, a state judge has already held illegal even the original seizures of sample copies of the magazines. See note 2 of the majority opinion.

The majority also differentiates this set of facts from *Roaden* on the ground that there was no time to seek a warrant since the magazines might meanwhile "have been destroyed, concealed, or transferred out of the jurisdiction." (This observation, of course, does not apply to the six sample copies of each magazine, which the police could, and did, take under the orignal warrants for evidentiary purposes.) *Roaden* did suggest in dictum that exigent conditions might permit an occasional warrantless seizure. 93 S. Ct. at 2802. The Court, however, specifically stated that:

> The facts surrounding the "massive seizures" of books in *Marcus* and *Quantity of Books* . . . presented no such "now or never" circumstances.

Id. *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), dealt with the seizure of thousands of magazines from a warehouse—just the kind of situation involved in the sequestration here. It is therefore clear that the "urgency" claimed on these facts cannot, any more than the existence of "cause," justify the warrantless seizure of the 19,000 publications, particularly since "prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness." *Roaden, supra*, 93 S. Ct. at 2801.

Accordingly, I would withdraw our prior opinion and affirm the order of the district court.

APPENDIX C

Court of Appeals Opinion
November 14, 1972

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 3—September Term, 1972.

(Argued September 11, 1972 Decided November 14, 1972.)

Docket No. 72-1208.

G. I. DISTRIBUTORS, INC., ALVIN DRUSS, IRVING HERMAN and DATA AFFILIATES, INC.,
Plaintiffs-Appellees,

v.

PATRICK MURPHY, Individually and in his capacity as Police Commissioner of New York City,
Defendant,

FRANK S. HOGAN, Individually and in his capacity as District Attorney of New York County,
Defendant-Appellant.

Before: Friendly, Chief Judge,
Lumbard and Feinberg, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Edward Weinfeld, J., wherein appellant was required to return to the appellees 19,000 magazines which were held to be seized in violation of the first amendment.

Reversed.

Court of Appeals Opinion November 14, 1972

Hugh Anthony Levine, Assistant District Attorney, New York County (Frank S. Hogan, District Attorney, and Michael R. Juviler, Assistant District Attorney, on the brief), for appellant.

Herald Price Fahringer, Buffalo, New York (Lipsitz, Green, Fahringer, Roll, Schuller and James, on the brief), for appellees.

LUMBARD, Circuit Judge:

The District Attorney of New York County[1] appeals from part of an order of the Southern District of New York which requires him to return to the appellees 19,000 magazines which had been seized less than 18 hours prior to an adversary hearing on their obscenity. At the hearing which was held the following morning Judge Moldow of the New York City Criminal Court authorized the seizure. Judge Weinfeld found that the procedures followed by the police in confiscating these magazines prior to the hearing violated the first amendment as applied to the state by the fourteenth amendment. We reverse for the reasons given below.

On Thursday, January 6, 1972 the New York City police, acting pursuant to a search warrant and under the supervision of the District Attorney of New York County, entered the Long Island City warehouse of appellee G.I. Distributors, a wholesale distributor of books and periodicals, and seized six copies each of 55 allegedly obscene mazazines.[2]

[1] Defendant Patrick Murphy, sued individually and in his capacity as Police Commissioner of New York City, does not appeal from the lower court order.

[2] On January 5, 1972, the New York City Police Department obtained a search warrant from Judge Tyler of the New York Criminal Court authorizing the seizure of copies of 24 specified magazines and

(Footnote continued on following page)

While conducting the search the police discovered 19,000 additional copies of the publications they were seeking. An adversary hearing on the magazines' obscenity was scheduled for the following morning and G.I. and its attorney were notified. To prevent possible removal of the magazines before the hearing, the police packed the periodicals in 221 cartons and stationed a police officer on G.I.'s premises overnight.[3]

The hearing was held the next morning before Judge Moldow, who examined samples of the 55 magazines and found probable cause to believe that they were obscene. He issued a search warrant authorizing the seizure of the

(Footnote continued from preceding page)
all the books and records of G. I. Distributors. The warrant for some reason contains no finding that the magazines are obscene; but the police affidavit on which the warrant was based does contain such a claim. While executing the warrant the next day the police found 32 other publications which they felt were obscene. Judge McQuillan, another Criminal Court judge, came to G. I.'s premises on the evening of January 6th to view these magazines. He found them to be obscene and issued a search warrant authorizing the seizure of six copies of each. One of the 56 periodicals which the police were authorized to seize could not be found.

On this appeal we do not reach the question of whether the search warrants were valid under the fourth amendment. Nor is there any occasion for us to pass upon whether the magazines were in fact obscene—a question which was not raised either here or in the district court. The appellees' brief states that at the hearing before Judge Moldow counsel for appellees argued that the magazines were not obscene.

[3] When they left, however, the police also took all of the books and records of G. I. Distributors including those that dealt with publications not at issue in the current case. The following day, January 7, 1972, the police returned with a warrant to search the premises of appellee Data Affiliates, Inc., a New York corporation in the business of supplying computer services to several companies. Data Affiliates leases office space from G. I. Distributors and provides some computer services to it but these are its only connection with G. I. The police seized all of their business records and computer tapes.

19,000 copies[4] and they were removed from G.I.'s Long Island City warehouse the same day.[5]

Three days later, on January 10, 1972, appellees brought suit under 18 U.S.C. § 1983 in the Southern District seeking return of the 19,000 magazines and other relief.[6] Relying on the Supreme Court's decision in *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), and our decisions in *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (2d Cir. 1970) and *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969), Judge Weinfeld held that the first

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[4] The New York Criminal Procedure Law authorizes a Criminal Court judge to issue a search warrant and, when necessary, to conduct a hearing to "examine, under oath, any person [who] . . . may possess pertinent information." See Criminal Procedure Law §§ 690.05(1), 690.40(1). Nevertheless, appellees assert that several recent New York decisions have held that Criminal Court has no jurisdiction to conduct an adversary hearing on the question of obscenity prior to issuing a search warrant, because New York already has a civil procedure for suppressing obscene material, see C. P. L. R. § 6330, and because there may be constitutional objections to the search warrant procedure. The New York Supreme Court decisions are in conflict on this matter, *compare People* v. *O'Brien*, 66 Misc. 2d 254, 320 N.Y.S. 2d 425 (Sup. Ct. 1971); *Milonas* v. *Schwalb*, 65 Misc. 2d 1042, 319 N.Y.S. 2d 327 (Sup. Ct. 1917) *with Bethview Amusement Corp.* v. *Judges of Nassau Co.*, D. Ct., ____ Misc. ____, 322 N.Y.S. 2d 42 (Sup. Ct. 1971) *(and) People* v. *Schiffien*, 64 Misc. 2d 311, 314 N.Y.S. 2d 745 (Sup. Ct. 1970), and, absent any definitive word from the state appellate courts, we feel constrained to follow the clear grant of jurisdiction which is contained in the Criminal Procedure Law. Moreover, if appellees, plaintiffs below, wished to challenge the jurisdiction of the Criminal Court in this matter under New York law, they should have raised that issue in the New York courts, not here.

[5] The facts in this paragraph are asserted in the appellant's brief and were stated at argument. They were in part conceded in the argument of appellees' counsel and in part not denied. The record contains no information regarding the hearing before Judge Moldow.

[6] They also sought return of all the business books and records that had been taken from the two corporate appellees.

amendment, as applied to the states by the fourth amendment, requires an adversary hearing before the seizure of allegedly obscene material. He found that the overnight quarantine of 19,000 magazines was an invalid prior restraint; he ordered the magazines returned to appellees and granted the other relief prayed for in the complaint.[7]

An application for a stay of Judge Weinfeld's order was denied by this court on January 26, 1972, and by Mr. Justice Blackmun on January 28, 1972.

Appellant challenges on this appeal only that part of Judge Weinfeld's order requiring him to return the 19,000 magazines. The District Court [*sic*] claims that the procedures followed by the police in sequestering the 19,000 periodicals overnight did not violate the first amendment.[8] We agree.

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[7] Noting that the other property which had been seized was part of a single successful attempt to shut down all of G. I.'s operations without a prior hearing on whether G. I. was purveying obscenity when less than 10% of publications distributed by G. I. were involved in the pending prosecution, Judge Weinfeld decreed that all of the property taken from appellees except the 330 magazines which had been seized initially be returned on the condition that appellees not dispose "of any of the business books, records and other material directed to be returned, so that they will be available for subpoena in the State prosecution."

A further question is whether the magazines returned to the appellee pursuant to the district court's order have now been distributed to retailers, thus rendering the appeal moot. We were assured on oral argument, however, that a substantial number of the magazines in question are still in appellee's possession and thus there is a live issue whether appellant can retake them pursuant to the state judge's order.

[8] The appellant claims for the first time on this appeal that plaintiffs' complaint in the district court also failed to state a claim for federal injunctive relief because there was no showing that irreparable injury resulted from the overnight quarantine of the magazines. See *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959); *Capital City Gas*

(Footnote continued on following page)

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The discovery of a large cache of magazines thought by the police to be obscene necessitated immediate action on their part to seize it as contraband[9] and to secure it as evidence in a criminal prosecution for wholesale distribution of pornography, a felony under New York law.[10] The police had good reason to believe that the magazines were obscene, since all of the periodicals specified in the warrant had previously been scrutinized by a judicial officer

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(Footnote continued from preceding page)

Co. v. *Phillips Petroleum*, 373 F.2d 128 (2d Cir. 1967). Although we need not consider this issue, we note that appellant has misconstrued the nature of the irreparable injury requirement in first amendment cases. Assuming for the moment that appellees were correct in their assertion that the overnight quarantine before an adversary hearing could be conducted was violative of the first amendment, then "the procedure leading to the seizure order was constitutionally deficient." *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 210-11 (1964); *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410, 412 (2d Cir. 1969). "A violation of the Fourteenth Amendment infected the proceedings" and not only the original overnight quarantine of the magazines but their subsequent retention by the police was invalid. *See Marcus* v. *Search Warrants*, 367 U.S. 717, 738 (1961). Thus, in determining the seriousness of the threatened injury we look not only to the overnight seizure but also to the entire time in which the material would be kept in police hands and away from the public. It makes no difference that the magazines were later found to be obscene in an adversary hearing. See *A Quantity of Books* v. *Kansas*, *supra* at 212-13. If they were seized initially in violation of the procedures mandated by the first amendment, irreparable injury was threatened, and it is now settled law that federal injunctive relief will issue to insure their return. *E.g.*, *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (1970), *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969); *Potwora* v. *Dillon*, 386 F.2d 74 (1967). See also *G. I. Distributors, Inc.* v. *Murphy*, 336 F.Supp. 1036, 1038-39 (1971).

[9] The New York Criminal Procedure Law authorizes the issuance of a search warrant to seize contraband (*i.e.*, property unlawfully possessed). See New York Criminal Procedure Law § 690.10(2).

[10] New York Penal Law § 235.06 (McKinney Supp. 1972). On the evening of January 6, 1972 Alvin Druss and Irving Herman, president and secretary-treasurer respectively of G. I. Distributors, had been arrested for felonious wholesale promotion of obscenity.

who had found them to be so. They immediately recognized that an adversary hearing was required before the magazines could be removed and kept until the trial of the criminal charges.[11] The District Attorney scheduled a hearing at the earliest possible time—the following morning—and notified the parties. Understandably anxious that the magazines not disappear during the short delay before the hearing, the police took the precaution to segregate them from the other publications in G.I.'s warehouse and stationed a man there for the night to see that they were not removed. This was a minimal interference with the normal distribution of the magazines because the quarantine occurred only from sometime after 6 P. M., January 6,[12] until Judge Moldow's issuance of the search warrant after a hearing the next morning. As there is nothing in the record to show that G.I. had any plans to distribute any of the magazines after usual business hours on January 6, the interference with possible distribution to retailers could not have amounted to more than a few hours on the morning of January 7th.

The police procedure used here was designed to restrain distribution of the magazines for the minimum time possible until an adversary hearing could be held before a

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[11] In *United States* v. *Wild*, 422 F.2d 34 (2d Cir. 1969) we held that a small number of copies of allegedly obscene magazines could be seized by the police on the strength of a search warrant issued *ex parte* and without a prior adversary hearing, because the danger of suppressing protected expression was minimal. However, in *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964) the Supreme Court held that when a large number of books are to be seized and kept for a substantial time by the police, a prior adversary hearing must be held.

[12] Although the record is silent as to when the police first sequestered the magazines, presumably it was some time after Judge McQuillan signed the search warrant at 6 P.M. on January 6, 1972.

judicial officer. That hearing was held promptly the next morning, and a decision was rendered immediately thereafter. Thus, the procedure did not present the interference condemned in *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961) and *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964). *Marcus* involved an attempt to suppress allegedly obscene books by means of a vague search warrant which in effect allowed the police to seize anything that they deemed to be obscene. *A Quantity of Books* concerned the seizure of a large number of books under a statute which did not permit a hearing on the books' obscenity until at least 10 days after the seizure and did not require the judge to make a speedy decision after the hearing. Unlike these cases, no extended interruption in the public's access to the magazines nor long term suppression of possibly non-obscene literature was threatened here. Therefore, we hold that the procedures used by the police in this case did not offend the first amendment.

We find support for our conclusion in several recent Supreme Court decisions. While it has been clear for some time that all prior restraints were not invalid, see *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43 (1961), it was not until 1965 that the Supreme Court in striking down Maryland's motion picture censorship statute indicated some of the essential elements of an acceptable licensing scheme. *Freedman* v. *Maryland*, 380 U.S. 51 (1965). The Court stated that any restraint imposed in advance of an adversary hearing on the obscenity question must be "for the shortest period compatible with sound judicial resolution . . . [and] the procedure must also assure a prompt final judicial decision." *Freedman* v. *Maryland*, *supra* at 59. *See* also *Teitel Film Corp.* v. *Cusach*, 390 U.S. 139 (1968); *Blount* v. *Rizzi*, 400 U.S. 410 (1971).

Court of Appeals Opinion November 14, 1972

Last term the Supreme Court spelled out for the first time a set of specific requirements which would meet, in at least one factual context, the standards laid down in *Freedman*. In *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971), the Supreme Court upheld 18 U.S.C. § 1305(a) which prohibits the importation of obscene materials into the United States and authorizes the seizure of such materials by customs officials pending a hearing by the district court on their obscenity. As enacted by Congress, § 1305(a) contained no time limits within which judicial action had to be commenced. To bring the statute into harmony with the first amendment, the Supreme Court read into § 1305(a) the requirement that judicial "proceedings be commenced within 14 days and completed within 60 days of their commencement." *United States* v. *Thirty-Seven Photographs*, *supra* at 373.

Justice White, writing for the majority, stated that, "of course, we do not now decide that these are the only constitutionally permissible time limits. We note, furthermore, that constitutionally permissible limits may vary in different contexts." *United States* v. *Thirty-Seven Photographs*, *supra* at 374. Each pre-hearing seizure must be evaluated in light of its particular circumstances and the nature and duration of the restraint imposed. The procedures followed in this case resulted in the least prior restraint possible in the situation.[13]

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[13] Appellees contend that *Thirty-Seven Photographs* is inapplicable to the present case because it dealt with the regulation of products coming into this country. In fact, the government's brief in *Thirty-Seven Photographs* argued that the government had complete discretion in excluding items coming into the country. The Supreme Court implicitly rejected this contention by choosing to treat the case as one to be tested by settled first amendment precedents alone.

Nothing in our decisions in *Astro Cinema Corp.* v. *Mackell,* 422 F.2d 293 (2d Cir. 1970) or *Bethview Amusement Corp.* v. *Cahn,* 416 F.2d 410 (2d Cir. 1969) is inconsistent with the result we reach here. Both *Astro* and *Bethview* concerned the seizure of a motion picture film during a regular theatre performance as evidence in a later prosecution for the crime of obscenity. The films were not seized by the police as a temporary measure until a full adversary hearing could be had; instead they were to be retained as evidence until the trial of the underlying criminal charges. Thus, the defendants had no way of securing a prompt judicial determination of the question of the obscenity except by bringing suit themselves. In such circumstances we concluded that "if the State wants to interfere *substantially* with the distribution of films or books, it must first provide . . . an adversary hearing." *Astro Cinema, supra* at 296 (emphasis added). However, when we were presented with a minor and insubstantial prior restraint involving the seizure of a few samples of allegedly obscene materials for evidentiary purposes, we did not hesitate to permit the seizure without a prior hearing. See *United States* v. *Wild,* 422 F.2d 34 (2d Cir. 1969), *reh. denied* (2d Cir. Feb. 2, 1970), *cert. denied,* 402 U.S. 986 (1971).

Were we to hold that no prior restraint whatever is permissible, even the few hours in this case, the police would find it virtually impossible to cope with the increasing flow of obscene magazines to the hundreds of outlets in our metropolitan centers. Arrests and the filing of criminal charges will not stop that flow; they provide only a brief interruption after which business continues as usual. The District Attorney argues that in order to keep illegal publications out of circulation it is necessary to seize and

confiscate them. The police seek to utilize New York's search warrant procedure to halt the flow of printed obscenity on the grounds that such materials are both contraband (*i.e.*, unlawfully possessed) and the means for committing the crime of wholesale promotion of obscenity in violation of Section 235.06 of the New York Penal Law. Unless the police are permitted to station an officer where contraband is found for such time as may be necessary to hold an adversary hearing regarding the propriety of the issuance of a search warrant, any seizure of such contraband will in all likelihood be frustrated. With no police observer on the scene, the distributors would be free to remove the material and distribute it from another location unknown to the police; thus, there would be nothing left to seize after the warrant has issued. We think that such considerations far outweigh the very slight interference with possible distribution which was here visited upon the appellees.

Our decision in this case is a limited one. Because of the incomplete record on appeal, we have no basis on which to question adequacy of the hearing. We decide only that the brief and insubstantial prior restraint which occurred here, followed a few hours later by a hearing, notice of which has been given to those in possession of the alleged obscene publications, does not violate the first amendment.

Court of Appeals Opinion November 14, 1972

FEINBERG, Circuit Judge (dissenting):

I dissent.

This seems to me an important and exceedingly close case. Important because it is apparently the first time this court has interpreted recent Supreme Court decisions as allowing seizure of all copies of an allegedly obscene book or magazine before an adversary hearing to determine obscenity. In *Overstock Book Co.* v. *Barry*, 436 F.2d 1289, 1296 (1970), we ruled precisely to the contrary. The case is close because there are persuasive practical arguments for deciding either way and the teaching of the precedents is not clear. But on balance I would affirm Judge Weinfeld's order.

As a matter of common sense, there is a good deal of merit in the majority's position that the prior restraint here was so "brief and insubstantial" that it did not "violate the first amendment." Yet, practicality alone also commends the holding of the district court that in this case there must be "an adversary hearing to determine obscenity prior to restraint or seizure, not a post-seizure hearing." This furnishes a clear, easily applied test of constitutional validity whereas the majority's position will necessarily involve the courts in intractable problems of drawing lines in cases involving attempts to suppress books and magazines.

Similarly, the prior cases leave one in doubt as to the required course here. The majority relies heavily on the standards for administrative film licensing first enunciated in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and later

applied primarily in film censorship cases. *E.g., Teitel Film Corp.* v. *Cusack,* 390 U.S. 139 (1968) (per curiam).[1] These criteria allowed a brief restraint prior to a final judicial determination, but this was explained by the Court as stemming from the unique nature of movie exhibitions—involving advanced scheduling of film runs at specific theatres—and the application of the *Freedman* rules was explicitly limited to films. 380 U.S. at 60-61. See also *Times Film Corp.* v. *Chicago,* 365 U.S. (1964). Recently, however, the Court has applied the *Freedman* standards in two obscenity cases not involving films, *Blount* v. *Rizzi,* 400 U.S. 410 (1970); *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971), and the majority cites these decisions to support its rejection of the pre-seizure hearing requirement. On the other hand, the Supreme Court held in *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964)—a decision explicitly overruled—that the failure of the state to provide an adversary judicial hearing on the issue of obscenity prior to the seizure by police of all copies of a number of books in the hands of a distributor rendered the procedure "constitutionally deficient." *Id.* at 211. In that case, the statute authorized such seizures with a subsequent hearing to determine whether the seized material was obscene and could be destroyed. The seizures were made pursuant to a very specific warrant issued after a judge had inspected copies of some of the publications proposed to be confiscated, see *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961), and the hearing was held ten days

[1] The Court in *Freedman* held that to survive judicial scrutiny, any system of film licensing must provide for a prompt decision and speedy judicial review in case the license is denied, must require the licensing agency itself to seek the review and must place the burden of proof of obscenity on the censor. 380 U.S. at 58-59.

later. Nevertheless, the Court invalidated the procedure because "the warrant . . . authorized the sheriff to seize all copies of the specified titles, and . . . P-K was not afforded a hearing on the question of . . . obscenity . . . before the warrant issued . . . ." 378 U.S. at 210.

The silent premise of the majority opinion is that *Blount* v. *Rizzi, supra,* and *United States v. Thirty-Seven Photographs, supra,* make *A Quantity of Books* no longer applicable. I do not believe that these two decisions—which involved federal statutory schemes for administrative review of allegedly obscene materials sold or advertised through the mails[2] or passing through United States Customs respectively—were intended to overrule *A Quantity of Books.* In neither case is there any intimation that *Freedman* is being extended to contexts other than the type of administrative review statutes in question.[3] Indeed, not one of the several opinions in either case even mentions *A Quantity of Books* or the problem of police seizures involved there—and here. This conclusion as to the limited scope of these recent decisions is further reinforced by the fact that the author of the Court's opinion in *A Quantity of Books* wrote the majority opinion in *Blount,* concurred in *Thirty-Seven Photographs,* and yet reiterated, less than three months

[2] The provisions in question, now 39 U.S.C. §§ 3006-07, authorize the Post Office to return all mail and payments addressed to an individual who is found to be selling obscene materials or sending advertising for it through the mails.

[3] The plurality opinion in *Thirty-Seven Photographs* rested heavily on the unique and historic power of United States Customs officers:

> Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country.

402 U.S. at 376. See also d. at 378 (Stewart, J., concurring).

before the latter decision, the continuing validity of the rule of *A Quantity of Books*. See *Dyson v. Stein*, 401 U.S. 200, 204 (1971) (Brennan, J., concurring).

Therefore, we are left with uncertain guidance in applying precedents to a new fact pattern, not an unusual situation for a court to be in. I will not pretend to be outraged by the restraint in this case of only "a few hours," after which the magazines were found to be obscene. But I do think that the procedure approved here poses dangers to the preferred interests protected by the first amendment. The majority allows the seizure prior to an adversary judicial hearing of *all* copies of an allegedly obscene magazine, completely preventing its distribution to the public. This is far different from the seizure of just a few copies for use as evidence, a procedure we have already approved. *Overstock Book Co.* v. *Barry, supra*. While the restraint prior to the hearing was brief here, it is likely, especially in the absence of specific statutory limitations, that a case-by-case approach will either tolerate the gradual relaxation of constitutional requirements or force this court to make repeated, arbitrary distinctions. How soon must the adversary hearing be held? The prior restraint here was only "a few hours on the morning of January 7th," according to the majority. Would prior restraint of a book or magazine for an entire day be too much? Or a few days? Or a few weeks? How soon must the adversary hearing be concluded? Is there any significant difference between magazines in a warehouse and a supply of books in a retailer's storage area? Although it is asserted that such a flexible approach is necessary to successful enforcement of anti-obscenity laws, we should remember that our primary concern is not with the danger that some obscene

publications might escape the prosecutor's net; it is, rather, with the protection of the public's right to read *nonobscene* books or magazines that some official may mistakenly regard as obscene. The furnishing of an effective "safeguard against the suppression of nonobscene books" is what the constitutional issue is all about. See *A Quantity of Books* v. *Kansas, supra,* 378 U.S. at 208. Drawing the hard-and-fast line of a prior adversary hearing before total seizure of books and magazines—as was done in *A Quantity of Books, supra*—has the virtue of accomplishing just that.[4]

Blount and *Thirty-Seven Photographs* may perhaps presage a dilution of the limitations previously imposed on police seizure of allegedly obscene books and magazines. But the Supreme Court has not extended *Freedman* that far, and I would rely on *A Quantity of Books* and on our own prior decision in *Overstock Book Co., supra,* 436 F.2d at 1296. See also *American News Co.* v. *Ladas,* 454 F.2d 1237 (6th Cir. 1972).

For these reasons, I would affirm Judge Weinfeld's order.

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[4] It is true that the Supreme Court in *United States* v. *Thirty-Seven Photographs, supra,* engaged in a form of line-drawing when it read into the law a set of time limits for the start and conclusion of hearings following the impounding of allegedly obscene material by United States Customs. 402 U.S. at 373-74. However, this was done to save an existing federal statute incorporating a long-recognized power of national sovereignty. It does not follow that this court should, in the absence of a carefully drawn state statute, invite future litigation on a case-by-case basis to explore further the possible extent of police power to seize and hold material that may ultimately be found to be protected expression.

APPENDIX D

District Court Opinion

By Edward Weinfeld, D. J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(Same Title.)

Herald Price Fahringer, Esq., One Niagara Square, Buffalo, New York, Attorney for Plaintiffs.

J. Lee Rankin, Esq., Corporation Counsel, Municipal Building, New York, New York, Attorney for Defendant Murphy.

Michael M. Klein, Esq., Assistant Corporation Counsel, of Counsel.

Frank S. Hogan, Esq., District Attorney, New York County, 155 Leonard Street, New York, New York, Defendant Pro Se.

Hugh Anthony Levine, Esq., Assistant District Attorney, of Counsel.

Plaintiffs, G. I. Distributors, Inc., a magazine and book distributor, and Data Affiliates, Inc., a computer service company, bring this action pursuant to 42 U.S.C., section 1983, and preliminarily move for the return of their respective properties seized by the defendants pursuant to warrants of seizure issued by judges of the Criminal Court of the City of New York. It was a massive seizure—the plaintiffs' premises were stripped clean. In the instance of the plaintiff distributor, initially six samples each of fifty-five alleged obscene magazines were seized; in addition, 19,000

copies of the fifty-five items were crated in 221 separate cartons, confiscated by the police and set aside in the warehouse under police guard; also seized were all its business records of every kind, nature and description. In the instance of the plaintiff Data Affiliates, Inc., which furnishes computer services to plaintiff distributor, as well as to eight other companies who have no connection with the plaintiff distributor, the seizure extended to electro-magnetic disc, tapes and other items used to prepare payroll billings and other services for the customers.

This application for the immediate return of the seized property brings into sharp focus the irreconcilable holdings between our Court of Appeals[1] and the New York State Court of Appeals[2] on applications for the return of alleged obscene or pornographic material seized under a warrant but without a prior adversary hearing. Our Court of Appeals holds that the First Amendment, as applied to the states by the Fourteenth Amendment, requires an adversary hearing before seizure. This court, of course, is bound to follow its ruling absent a doctrinal trend indicating a reversal of attitude with respect to its holding.[3] There is no such indication; to the contrary, recently it seemingly adhered to its position when it denied a stay of an order entered by Judge Pollack in reliance upon *Bethview* direct-

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[1] *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293 (2d Cir. 1970); *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2d Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). *See also Mod Amusement Co.* v. *Murphy*, 72 Civ. 1 (MP) (S.D.N.Y., filed Jan. 7, 1972); *P.A.J. Corp.* v. *Murphy*, 302 F. Supp. 704 (1970).

[2] *People* v. *Heller*, ____ N.Y.2d ____ (1971), 116 N.Y.L.J., no. 115, p. 1 (issue of Dec. 16, 1971).

[3] *Cf. United States* v. *Ullman*, 221 F.2d 760, 762 (2d Cir. 1955), *aff'd*, 350 U.S. 422 (1956).

ing the return of seized films where no prior adversary hearing had been conducted.[4]

Plaintiff distributor offers no objection to the retention by the defendants of six copies of each of the fifty-five alleged obscene items, a total of 330, as sample evidence for use by the State in connection with the pending charges relating to such materials. The defendants are directed to return the remaining seized alleged obscene material—the 19,000 magazines which, it is clear, were seized as part of the initial search. They were not immediately removed as a matter of convenience to the police, and a subsequent hearing before a judge of the Criminal Court of the City of New York was held only after the 19,000 magazines had already been seized. For the purpose of determining prior restraint, the plaintiff G. I. Distributors had already been effectively prevented from distributing its wares and the public from reading them.[5] Constitutional requirements mandate an adversary hearing to determine obscenity prior to restraint or seizure, not a post-seizure hearing.

There remains the question as to other materials seized, which clearly do not come within the category of alleged obscene matter. The seizure here was of lock, stock and barrel; it included, in addition to the alleged contraband material, all plaintiff's business records, from employee history cards to general ledgers, checkbooks, payroll records, order books and all items required in the conduct and performance of its business. The State contends that these

[4] *Mod Amusement Co.* v. *Murphy*, 72 Civ. 1 (MP) (S.D.N.Y., filed Jan. 7, 1972). The motion to stay the order was denied by the Court of Appeals on January 12.

[5] *Cf. A Quantity of Books* v. *Kansas*, 378 U.S. 205, 212-13 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

other records, including those of Data Affiliates, Inc., were seized and intended for use as evidence in the criminal prosecution, and it argues even if the seizure was constitutionally overbroad, the court should not order their return but remit plaintiffs to their remedy in the state courts. However, upon the facts of this case, it would fly in the face of reality to direct the return of the alleged contraband material under *Bethview* and treat the balance of the mass seizure separately. The seizure interrupted the normal functioning of each plaintiff's business and effectively curtailed all their operations. In the instance of G. I. Distributors, the seized material constituted only a minor part of the publications distributed—less than 10%—yet it was prevented from distributing all its publications. In the case of the computer service plaintiff, the only relationship of its records to the distribution of purported pornography was the payroll billings for G. I. Distributors' employees. In end result, the defendants' seizure of (1) the alleged contraband material and (2) the ordinary books, records and other business documents for the functioning of plaintiffs' respective businesses constituted an effective prior restraint because in combination they totally prevented the G. I. Distributors from distributing its magazines and reaching the public. It was as effectively prevented from distributing by having its records or orders for magazines seized, without which it was unable to make any distribution, as it was by the seizure of the magazines themselves. As Mr. Justice Brennan stated in his concurring opinion in *Dyson* v. *Stein*:[6]

> "If proved, [the alleged police conduct] would justify federal intervention. The mass seizure of some

[6] 401 U.S. 200, 204 (1971).

> two tons of the issues of the newspaper without a prior judicial determination of the alleged obscenity of the issues was unconstitutional. • • • Similarly, the mass seizure of the tools and equipment required to prepare the newspaper—insofar as it disabled appellee from publishing future issues—infringed the principle of Near v. Minnesota, 283 U.S. 697 (1931)."

Subsequent to *Bethview* and *Astro Cinema*, the Supreme Court decided a series of cases indicating that absent a showing of "bad faith, harassment, or any other unusual circumstances that would call for equitable relief," federal courts should not intervene in pending state criminal proceedings.[7] While it does not now appear that the defendants can be charged with bad faith or harassment, since they followed the procedure approved by the New York Court of Appeals, there are sufficient extraordinary circumstances with a showing of irreparable injury to warrant federal injunctive relief. Unlike a mere possibility of a "chilling effect" on the First Amendment freedoms,[8] here there was a complete and total restraint upon the operations of a magazine distributor, the overwhelming majority of whose distribution could not constitutionally be prevented even after an adversary hearing. Unlike the situation in *Perez* v. *Ledesma*,[9] there is no adequate remedy under New York law to obtain the prompt return of the material at issue.[10] The remedy exists in theory, but in practice has

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[7] *Younger* v. *Harris*, 301 U.S. 37, 54 (1971). *See also Byrne* v. *Karalexis*, 401 U.S. 216 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971).

[8] *Cf. Younger* v. *Harris*, 401 U.S. 37, 51 (1971).

[9] 401 U.S. 82 (1971).

[10] *See Potwora* v. *Dillon*, 386 F.2d 74 (2d Cir. 1967); *Gregory* v. *DiFlorio*, 298 F. Supp. 1360 (W.D.N.Y. 1969).

been cumbersome and inefficacious.[11] Moreover, in the light of New York's highest court's most recent ruling, it would appear futile to use it for the return of the alleged obscene material, since that court seemingly determined that a prior adversary hearing is not a prerequisite for such seizure.[12] Further, there is far less interference with the pending state proceeding than that involved in *Perez*, for here all of the materials returned to the plaintiffs would still be available for use in the criminal prosecution.[13] Plaintiffs do not seek an order suppressing the use of such evidence in the state prosecution.[14] Nor do they seek injunctive relief enjoining the state court prosecution or injunctive relief against future seizures. In any event, *Younger* v. *Harris* and related cases were before our Court of Appeals in the *Mod Amusement* case,[15] and, as already noted, the court refused to stay Judge Pollack's order returning the allegedly obscene films, an apparent indication that the clear holding in *Bethview* and *Astro Cinema* have not been compromised by the recent Supreme Court decisions.[16]

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[11] *Cf. Monroe* v. *Pape*, 365 U.S. 167, 174 (1961).

[12] *See People* v. *Heller*, ____ N.Y.2d ____ (1971), 116 N.Y.L.J., no. 115, p. 1 (issue of Dec. 16, 1971). This court uses the word "seemingly" because despite *Heller's* explicit holding and its extensive discussion of why an adversary hearing is unnecessary, the final paragraph attempted to distinguish a motion picture seizure from the massive seizure of publications.

[13] *See Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293, 296-97 (2d Cir. 1970).

[14] *Cf. Stefanelli* v. *Minard*, 342 U.S. 117 (1951).

[15] *Mod. Amusement Co.* v. *Murphy*, 72 Civ. 1 (MP) (S.D.N.Y., filed Jan. 7, 1972).

[16] But see *Rialto Theatre Co.* v. *Wilmington*, 440 F.2d 1326 (3d Cir. 1971) (per curiam); *Eve Productions, Inc.* v. *Shannon*, 439 F.2d 1073 (8th Cir. 1971) (per curiam).

Accordingly, defendants are directed to return the materials seized to the plaintiffs, without prejudice to the right of the defendants to subpoena the same for use as evidence in the pending criminal proceeding. The plaintiffs, as a condition of the granting of their application, are enjoined from disposing of any of the business books, records and other material directed to be returned, so that they will be available for subpoena in the State prosecution.[17]

This order is stayed until noon, January 20, 1972.

Dated: New York, N. Y.
January 19, 1972

EDWARD WEINFELD
United States District Judge

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[17] See *Astro Cinema Corp.* v. *Mackell*, 422 F.2d 293, 296-97 (2d Cir. 1970).

APPENDIX E

The following cases involved the seizure of First Amendment material without the benefit of a prior adversary hearing.

1. *State of Wisconsin ex rel. Nemec* v. *Steffes*, (Mil. Co. Cir. Ct., Doc. No. 380-118).

On June 17, 1970 authorities seized 500 paperback books, 2,000 magazines and 15 reels of film. Eighteen months later, on December 22, 1971, the materials were returned by the district attorney's office which retained only sufficient copies for prosecution.

2. *State of Wisconsin ex rel. Keeley* v. *Spracker*, (Mil. Co. Cir. Ct., Doc. No. 380-311).

On June 19, 1970 authorities seized 500 paperback books, 2,000 magazines and 15 reels of film. The materials were ordered to be returned, but were not released until December 22, 1971, eighteen months later. The district attorney's office retained sufficient copies for prosecution.

3. *Matter of Search Warrant for Best Buys Company* (LaCrosse Co. Ct., Wis., Doc. No. 4202-A).

On May 28, 1971 authorities seized 500 paperback books, 1,000 magazines and 100 reels of film. The materials were ordered returned and were finally released on January 31, 1972, seven months later. The district attorney's office was permitted to keep sufficient copies for prosecution.

4. *For Adults Only, Inc. v. State of Florida* (Cir. Ct., 11th Jud. Cir., Dade Co., Doc. No. 717412).

On May 12, 1971 authorities seized 192 paperback books, 900 magazines, 32 reels of film and 79 newspapers. These materials are still retained by the district attorney's office, while the case winds its way through the Florida appellate courts. A petition for certiorari has been filed in the Supreme Court of Florida and briefs have been submitted.

5. *People of the State of Illinois* v. *Larry Sparks* (Cir. Ct., 18th Jud. Cir., Doc. Nos. 72-M-1650 and 72-M-1651).

On June 6, 1972 authorities seized two reels of film without a warrant. The films are still retained by the authorities and a suppression motion is currently under advisement by the court.

6. *People of the State of California* v. *Frederick A. Loar and Kay Ann Loar* (Super. Ct., Orange Co., Cal., Case No. C-26732).

On May 24 and 25, 1971 authorities seized 22,500 reels of film and 30,000 photographs. Ultimately, the defendants were acquitted, but the films and photographs were never returned to them.

7. *State of Ohio* v. *Kassaim Migdadi* (Ct. of Com. Pleas, Franklin Co., Doc. Nos. 48322-48433, 29018-29019).

On November 10, 1969 authorities seized 4 magazines. Subsequently the defendant was acquitted of criminal charges and the magazines were returned to him on April 28, 1972, 17 months after their seizure.

8. *State of Ohio* v. *Robert L. Johnson* (Mun. Ct., Franklin Co., Doc. No. 10451).

On April 28, 1971 authorities seized 1,441 paperbacks and magazines. These materials have been in the possession of the authorities for 20 months.

9. *State of Ohio* v. *Robert L. Johnson* (Mun. Ct., Franklin Co., Doc. No. 10761).

On May 1, 1971 authorities seized 59 paperbacks and magazines. These materials have been in the possession of the authorities for 20 months.

10. *State of Ohio* v. *Robert L. Johnson* (Mun. Ct., Franklin Co., Doc. No. 12075).

On May 14, 1971 authorities seized 9 reels of film and 1 projector with cassette. These materials have been in the possession of the authorities for 20 months.

11. *State of Ohio* v. *Howard W. Bricker* (Mun. Ct., Franklin Co., Doc. No. 9789).

On April 20, 1971 authorities seized 36 paperback books and magazines. These materials have been in the possession of the authorities for 20 months.

12. *State of Ohio* v. *Howard W. Bricker* (Mun Ct., Franklin Co., Doc. No. 9898).

On April 21, 1971 authorities seized 32 paperback books and magazines which are still in custody.

13. *State of Ohio* v. *Howard W. Bricker* (Mun. Ct., Franklin Co., Doc. No. 12216).

On May 15, 1971 authorities seized 23 paperback books and magazines which are still in their custody.

14. *State of Ohio* v. *Arties* (Mun. Ct., Franklin Co., Doc. No. 24847).

On September 8, 1970 authorities seized 7 mechanical items and other related items which are still in their custody.

15. *State of Ohio* v. *Frank J. Capadonary*. (Mun. Ct., Franklin Co., Case No. 9672).

Ten paperback books and magazines were seized on April 19, 1971 and are still in their custody.

16. *State of Ohio* v. *Jacobs* (Mun. Ct., Franklin Co., Doc. No. 24849).

On September 8, 1970 authorities seized 8 movies and mechanical and other related items. These materials are still in their custody.

17. *State of Ohio* v. *Migdadi* (Mun. Ct., Franklin Co., Doc. No. 8125).

On April 3, 1971 authorities seized 22 paperback books and magazines which are still in their custody.

18. *State of Ohio* v. *Richard A. Blair* (Mun. Ct., Franklin Co., Doc. No. 9435).

On April 21, 1970 seven magazines were seized from the defendant. At the preliminary hearing, the court found no probable cause for the seizure, but the magazines were never returned.

19. *State of Ohio* v. *Richard A. Blair* (Mun. Ct., Franklin Co., Doc. Nos. 9380-9391).

On April 20, 1970 authorities seized 4 magazines. The criminal charges were dismissed, but the magazines were never returned.

20. *State of Ohio* v. *Richard A. Blair* (Mun. Ct., Franklin Co., Doc. No. 9467).

Two magazines were seized from the defendant on April 21, 1970 and, although the charges were dismissed, the magazines were never returned.

21. *People of the State of Illinois* v. *Wesley Ward* (Peoria City Cir. Co., Peoria, Ill., September, 1970).

In June of 1969 the authorities seized 400 magazines from the defendant. Despite the fact that he was acquitted, the magazines were never returned.

22. *People of the State of Illinois* v. *Clarence Allen Tannahill* (Madison Co., Edwardsville, Ill., October, 1971).

On June 6, 1971 authorities seized 1,500 magazines. Two-thirds of the materials were returned in October of 1971 and the remainder was held by the authorities despite the dismissal of all obscenity charges and a plea to a charge of disorderly conduct.

23. *People of the State of Illinois* v. *Smith and Sanford* (Cir. Ct., Champagne Co., Ill., July, 1970).

Authorities seized 1,000 magazines in March, 1970. The magazines were not released for five months, following the acquittal of the defendant.

24. *State of Oklahoma* v. *Sooner State News Agency* (Dis. Ct., Tulsa Co., Doc. No. CRF 71-1957).

On October 26, 1971 $18,000 worth of books and magazines and other materials were seized by the authorities. The indictment was subsequently dismissed on the ground that the materials were constitutionally protected. However, the materials were never returned to the defendant.

25. *People of the State of New York* v. *Bruce Allen Rosokoff* (City Ct., Syracuse, March, 1972).

On March 3, 1972 authorities executed a search warrant which did not name any publication. Approximately 120 magazines and books were seized and are still in the custody of the district attorney.

26. *State of North Carolina* v. *Bryant* (Super. Ct. and Dist. Appellate Ct., Greensburrow, N. Car.).

On May 18, 1971 authorities seized 4,000 magazines and reels of film from 3 bookstores. The materials were not released until January 28, 1972, eight months later, when the defendant was acquitted.

27. *State of Ohio* v. *John Marshall and Queens City News* (Ct. of Com. Pleas, Hamilton Co., Doc. No. B-7279).

On January 20, 1972 authorities seized 1,500 items from a warehouse including books, magazines, newspapers, records, film, and rubber goods. The defendant was indicted on a 41-count indictment involving only 41 items. The materials are still held by the law enforcement authorities.

On October 3, 1972 the court fined the defendant corporation $5,000 on each of the 41 counts in the indictment, for a total of $205,000. In the absence of any provision for a bond to be posted for a corporation, the sheriff was provided a levy of execution and, on December 6, 1972, seized from the corporation's warehouse all furniture, books, magazines, and even a Christmas tree. These materials, according to state statute, were to be sold at public auction in order to pay the fine. However, the district attorney, deciding that the books are not obscene, has indicated that they will not be sold as required by law.

28. *Commonwealth of Kentucky* v. *James Cornett and Stanley Marks* (Cir. Ct., 17th Jud. Dist., Compbell Co., Ky., Doc. Nos. 13768-13770).

In this shocking sequence of cases, the defendants' bookstore was raided and all books and magazines removed three times in the space of four days. Without a warrant, a police officer glanced at a book and two magazines and decided they were obscene. Upon his order, other police officers and the Commonwealth attorney seized all of the books and magazines, as well as the defendants' business license, United States currency, letters and other business records, and several 45 rpm. records. These materials were all removed in tractor trailer trucks on October 15, 1970.

On October 17, 1970 the store was partially restocked and reopened. The police officers, learning that the store had reopened, arrested the clerk and seized all of the magazines then on the premises without a warrant and without even examining the materials.

On October 19, 1970 the store reopened with a total of 21 magazines on the premises. Again police officers arrested the clerk and seized the magazines without first examining them and without a warrant.

Finally, on November 6, 1970 the United States District Court for the Eastern District of Kentucky granted injunctive relief against future seizures. At a motion to suppress held in the Circuit Court for the State of Kentucky, Campbell County, the Commonwealth Attorney admitted under oath that he did not understand the meaning of the legal terms obscenity and prior adversary hearing.

The motion to suppress was overruled, all materials are still retained by the State and despite subsequent purchases and indictments, no case has yet come to trial.

29. *State of Ohio* v. *Terry Barnett* (Mun. Ct., Hamilton Co., Doc. Nos. 831, 1209, 1210).

On June 14, 1972 authorities seized 54 magazines, 8 reels of film, and 8 motion picture projectors. These materials are still in the possession of the police and county prosecutor who refuse to return them to the defendant.

30. *Commonwealth of Kentucky* v. *Odis Hatfield and Charles Abrams* (Cir. Ct., Scott Co., Georgetown, Ky. Doc. No. 13843).

On January 28, 1971 authorities raided a theater under a general search warrant and seized 9 reels of film. No adversary hearing was held prior to the seizure. A motion to suppress is pending and the films are still retained by the authorities.

31. *People of the State of California* v. *Parker* (Super. Ct., Los Angeles Co., Dept. 116, Doc. No. A270-417, February 16, 1972).

On March 6, 1971 authorities seized 99 motion picture films. Subsequently, the defendant was acquitted and the films held to be constitutionally protected. However, the films were not returned to the defendant until March 16, 1972, one year later.

32. *Raro, Inc.* v. *Goodman et al.*, (U.S.D.C., S.D.Fla., Doc.No. 72-781, August 15, 1972).

In *Raro, Inc.* 4,000 books and magazines—the entire content of the bookstore—were seized after a sham adversary hearing in the store on May 12, 1972. The District Court ordered the materials returned almost five weeks later.

33. *United States* v. *Bilthels et al.*, (U.S.D.C., C.D.Cal., Doc.No. 6884-CD).

In *Bilthels* First Amendment materials were seized and never returned. No adversary hearing ever preceded the seizure. Of 30 separate counts in the indictment, convictions were obtained on only 8 counts.